

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
: Docket #1:21-mc-00813-
: AT

SEARCH WARRANT DATED :
NOVEMBER 5, 2021 :
: New York, New York
: November 29, 2021
:
----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE SARAH L. CAVE,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the United States: UNITED STATES ATTORNEY'S OFFICE
BY: ROBERT B. SOBELMAN, ESQ.
MITZI STEINER, ESQ.
One St. Andrew's Plaza
New York, New York 10007

For the Reporters REPORTERS COMMITTEE FOR FREEDOM OF
Committee for Freedom THE PRESS
of the Press: BY: KATIE TOWNSEND, ESQ.
CHARLIE HOGLE, ESQ.
1156 15th Street, N.W., Suite 1020
Washington, D.C. 20005

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

Proceedings conducted telephonically and recorded by
electronic sound recording;
Transcript produced by transcription service

INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
----------------	---------------	--------------	-----------------------	----------------------

None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
---------------------------	--------------------	-----------	-----------	----------------------

None

1 PROCEEDINGS 3

2 HONORABLE SARAH L. CAVE (THE COURT): Good
3 morning. This is Magistrate Judge Cave. I'll ask my
4 deputy to call the case, please.

5 THE CLERK: Your Honor, this is in the matter of
6 Search Warrant dated November 5, '21; 21-mc-813.

7 Counsel, please state your appearance for the
8 record.

9 MR. ROBERT SOBELMAN: Robert Sobelman, the United
10 States. And I'm joined on this call by Assistant U.S.
11 Attorney Mitzi Steiner. Good morning, your Honor.

12 THE COURT: Good morning.

13 MS. KATIE TOWNSEND: Good morning, your Honor.
14 Katie Townsend on behalf of the Reporters Committee for
15 Freedom of the Press. My colleague, Charlie Hogle, from
16 the Reporters Committee, is also on the line, but he won't
17 be addressing the Court.

18 THE COURT: Okay. Very good.

19 Mr. Sobelman, will it just be you speaking for the
20 government?

21 MR. SOBELMAN: Yes, your Honor.

22 THE COURT: Okay, so I'm just going to ask my
23 deputy, just so we don't get any feedback or anything,
24 she'll just mute the other lines aside from Mr. Sobelman
25 and Ms. Townsend.

PROCEEDINGS

4

Okay, great. All right, so, Ms. Townsend, we have before the Court the Reporters Committee's request to unseal the search warrant materials relating to the November 5th search warrant. And so, given that it's your motion, you can have the floor first.

MS. TOWNSEND: Thank you, your Honor. And I won't repeat what we've detailed in the papers, which I'm sure the Court is familiar with and the Court and the Court is. But I will highlight a couple of points. The Reporters Committee has moved for public access to the search warrant application, supporting affidavit, any other related sealed judicial documents concerning the November 5th search warrant that was executed at the home of Mr. O'Keefe. These search warrant materials are, for the reason that we've detailed in our papers and a number of courts in this district have held, applying Second Circuit law, plainly judicial documents to which a strong common presumption of public access applies; and that the determination that it does not, as the government has argued and as I think we addressed early in our reply, turn on the status of the government's investigation.

Now, what's the status of the government's investigation may be relevant to -- and I think we've acknowledged this from the outset -- is the extent to which

PROCEEDINGS

5

1 the common law presumption may be overcome at present. Put
2 another way, is there information in the search warrant
3 application or affidavit or other documents that we've
4 moved to unseal that the government has demonstrated needs
5 to be redacted, at least for now. And, as we've argued in
6 our reply, we don't think the government has met its burden
7 in its opposition to demonstrate that any specific
8 redactions are necessary but let alone that nothing can be
9 unsealed at this point in time, which is what the
10 government's position is.

12 This is, I think it's fair to say, your Honor, an
13 unusual matter. It is certainly not the usual case, that
14 the showing that the government made to obtain a search
15 warrant is sort of in and of itself of particular interest
16 to the press and the public prior to any charges being
17 filed in a given case. But here, Mr. O'Keefe and Project
18 Veritas accused the government of wrongdoing, indeed
19 unlawful conduct, in obtaining and executing the search
20 warrant, including violations of the Privacy Protection Act
21 of 1980, violations of the Department of Justice media
22 guidelines.

23 The government has stated publicly --

24 THE COURT: Can I just interrupt you for one
25 second on that point?

PROCEEDINGS

6

MS. TOWNSEND: Of course.

THE COURT: I'm sorry to interrupt you. But do you have any cases that support sort of a reporter's exception or any other circumstances like this where there might be an additional support for allowing access to the search warrants in an ongoing grand jury investigation?

MS. TOWNSEND: I think what we've cited, your Honor, I think is a relevant piece here, and this goes to the strength -- I think this goes to the strength of the presumption of access, which under Second Circuit law is what the Court should evaluate. Once the Court determines that these are in fact judicial documents, it looks to the weight of the presumption in a given case. And, as we've argued in our papers, search warrant materials are, there's always a strong presumption of access because of the probable cause determination that the Court is required to make on the basis of the application and affidavit. But we noted -- we cited *Hardy v. Kaszycki & Sons*, a Southern District of New York case from November of 2017, in our papers to demonstrate that the Courts determine the weight to be stronger when there is a legitimate public interest. In particular in access to information, that's context that the Court shouldn't ignore when it's determining the weight of the presumption in a given case.

PROCEEDINGS

7

And I do want to underscore, your Honor, that the government has stated publicly, including in its opposition to Mr. O'Keefe's and Project Veritas's motion for the appointment of a special master, that the showing the government made in its search warrant application and affidavit squarely refutes the accusations that have been made by Mr. O'Keefe and Project Veritas. And I'm not suggesting that the Reporters Committee or any member of the public has reason necessarily to doubt that representation by the government, but as Chief Justice Burger noted in *Richmond Newspapers*, it's difficult for the public to accept what it's prohibited from observing. And I think, given the very public nature of that dispute over the propriety, frankly, of the search warrant itself, really the only way for the public to get true clarity about the government's actions with respect to these searches, which again is of paramount importance whether or not the government pursues any criminal charges here, is for the showing the government made to the Court in support of the search warrant to be public, at least to the greatest extent possible.

THE COURT: Right. But why does that outweigh the need for grand jury secrecy, which is also protected by the cases and the Federal Rules of Criminal Procedure,

1 including Rule 6; why is that more urgent, the need for
2 sunshine on the search warrant, why is that need more
3 urgent than protecting the grand jury's secrecy?

4 MS. TOWNSEND: Well, I think, your Honor, that
5 there isn't -- I don't think we would dispute and we do not
6 dispute that an ongoing grand jury investigation is a
7 countervailing factor that may weigh against access in a
8 given case. I think that is, particularly in this case,
9 where there's a number of pieces of information, including
10 the existence of the grand jury investigation, that have
11 already been made public by the government itself, I would
12 think that that would weigh, that would be a factor that
13 would be taken into account for purposes of redaction, your
14 Honor, not wholesale sealing. And I think that the
15 Reporters Committee in its initial motion and again
16 reiterated in its reply that, to the extent the Court finds
17 that there are countervailing factors that outweigh the
18 common law presumption at this point in time, that we would
19 advocate for a redacted version, we would ask that a
20 redacted version be placed on the public docket, and that
21 to the extent down the road, a few weeks from now perhaps
22 or a month from now, there is no more need for redaction,
23 that the materials could be unsealed more thoroughly at
24 that point in time.
25

PROCEEDINGS

9

THE COURT: Okay. So since you submitted your reply and we scheduled this call, Judge Torres has issued an order on November 23rd in which she denied, I believe it's Project Veritas and Mr. O'Keefe's motion seeking unsealing of, I think, the same information that you're seeking unsealing here. So why doesn't that either moot the Reporters Committee's request or at least isn't the law of the case?

MS. TOWNSEND: I don't think it's dispositive, your Honor, for a few reasons. One is that the one-page motion for -- I don't believe it was a motion to unseal; I believe it was a motion for production or a motion asking the Court to require the government to produce the affidavit to Mr. O'Keefe and Project Veritas. It was a one-page motion; it cited no case law; it did not refer to the common law presumption of access; it didn't refer, again, to any case law. It indicated that it was predicated on a need for Mr. O'Keefe and Project Veritas to respond to the government's opposition to their motion to appoint a special master. And Judge Torres did indeed deny that motion for access. She did address the merits, even though the motion was moot at that point because Project Veritas had filed its reply. She did address the merits; but, again, faced with no case law, she seemed to ground

1 PROCEEDINGS 10

2 that in a finding that there was no Fourth Amendment right
3 to an uncharged party to inspect a warrant.

4 So, one, I don't think that that was a motion to
5 unseal, citing the common law presumption of access, which
6 is what the Reporters Committee has asserted here. It
7 wasn't an issue that was presented to Judge Torres. And I
8 would take the position, your Honor, respectfully, that it
9 does not address the issues that we've raised in our motion
10 and briefing.

11 THE COURT: Okay. Can I ask you just a logistical
12 question? Attached to your November 15th letter is a copy
13 of the search warrant itself with redactions. Are those
14 redactions that the Reporters Committee put on the search
15 warrant, or did the search warrant come to you with those
16 redactions?

17 MS. TOWNSEND: Those are not redactions that we
18 placed on that document, your Honor. That is the document
19 that was attached -- or a copy of the search warrant that
20 was attached to the filing that Project Veritas made, which
21 I believe it's an initial filing in support of an
22 appointment of a special master.

23 THE COURT: Okay. Thank you.

24 And then I guess my last question for now is --
25 and your letter is grounded -- your request is grounded in

PROCEEDINGS

11

1 the common law, and I think in both your opening letter and
2 your reply you sort of encouraged me not to reach the First
3 Amendment grounds. If I deny your motion under the common
4 law, though, hypothetically, don't you want me to consider
5 whether -- the First Amendment arguments, as well?

6
7 MS. TOWNSEND: I think we can -- I would take the
8 position, your Honor, that the Reporters Committee -- the
9 common law presumption of access, which is incredibly
10 strong in this context for the reasons that we've
11 described, should entitle us to the relief that we've
12 requested. So, again, I would say that the Court need not
13 reach the First Amendment issue. I think the case law in
14 the Second Circuit and in the Southern District of New York
15 with respect to application of the common law presumption
16 is clear. And I would also note, your Honor, that, to the
17 extent the Court finds that, for example, an ongoing
18 investigatory need of the government requires redaction, I
19 think the Court would reach that same conclusion, quite
20 frankly, under the First Amendment and common law; and
21 given the clarity of the law under the common law, I think
22 that that is what we grounded our request in. I don't
23 think the Court needs to reach the First Amendment issues.

24 THE COURT: Okay. All right. Thank you,
25 Ms. Townsend.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

12

Mr. Sobelman, would you like to respond?

MR. SOBELMAN: Yes, your Honor, briefly, as I think most of these points have been dealt with in the government's brief.

First, with respect to Judge Torres' order, counsel is correct that this -- it did not squarely decide the same issue. But I think it takes the wind out of the sails of her argument. Her argument was, you know, Project Veritas and Mr. O'Keefe have raised issues about the search warrant, and somehow that increases the public's entitlement; their unilateral allegations increase the public's entitlement to this document, which we certainly do not concede and in fact dispute. Nevertheless, Judge Torres herself decided that the affidavits and their contents were not sufficiently placed at issue in the special master litigation to require them to be produced, even just to Mr. O'Keefe and Project Veritas.

So the idea that, you know, unilateral allegations by two individuals or an individual (indiscernible) entity somehow entitles the public to a sealed ex parte submission in a separate matter really can't stand in light of Judge Torres' ruling that even in that litigation with those two parties, those two parties are not entitled to the documents. We agree that the common law right of access is

1
2 a different analysis, assuming the Court finds that it
3 applies and chooses not to follow *Times Mirror*, but Judge
4 Torres' order we think is a very strong indication that the
5 argument being made today cannot succeed.

6 A couple of other responses. Counsel referenced
7 that, you know, now that the government has confirmed the
8 existence of the investigation, there's somehow less of a
9 need to protect the information that was submitted in a
10 sealed and ex parte proceeding. In every search warrant
11 that will be true. Search warrants are executed,
12 generally, on premises or individuals; and in almost all
13 circumstances, the individuals on whom those search
14 warrants are executed are aware of the execution of the
15 search warrant and given a copy of the search warrant,
16 consistent with the Federal Rules of Criminal Procedure and
17 related case law. It cannot be that, because a search
18 warrant has been executed in an ongoing investigation in
19 which no public charges have filed, suddenly the public is
20 entitled to the affidavit that was submitted in support of
21 that search warrant.

22 Your Honor, I'll finally note that here redactions
23 really are not practicable, to the extent the Court thinks
24 that, one, there is a common law right of access; and, two,
25 the entirety is not overcome by the presumption. In the

1
2 *Gunn* case in the Eighth Circuit there's a discussion of
3 whether redactions are appropriate or not appropriate at
4 page 574. I won't read the quotes to the Court, but to the
5 extent the Court is considering that type of remedy, we
6 would strongly oppose it. Just like in the *Gunn* case,
7 where they found redactions were not practicable, virtually
8 every page of the affidavit contains multiple references
9 and pieces of information to individuals, entities,
10 investigative techniques and procedures and evidence
11 gathered in this investigation that are simply not
12 appropriate to be made public at this time.

13 Unless the Court has any additional questions, the
14 government will otherwise rest on its brief.

15 THE COURT: Okay, Mr. Sobelman, so in the ordinary
16 course, then, the search warrant, affidavit and related
17 documents here will be sealed unless and until charges are
18 actually brought and then discovery were to proceed in the
19 criminal case; is that right?

20 MR. SOBELMAN: Yes, your Honor. In a typical
21 case, in this posture, the affidavit and related materials
22 remain sealed. If and when an indictment is filed against
23 someone investigated in the course of the investigation,
24 those materials are produced in discovery to the person or
25 entity that's charged as part of our Rule 16 obligations,

1 as Judge Torres made a reference to in her order that your
2 Honor referenced. And the affidavit, even at that time, is
3 not unsealed by the Court. It's simply provided only to
4 the charged party. And, in fact, you know, there was a
5 situation before Judge Torres in another case where even
6 after charged parties had been provided a sealed affidavit
7 that was submitted in support of a restraining order, Judge
8 Torres determined that uncharged parties who sought access
9 to that affidavit were not entitled to it in that
10 circumstance. So even after a charged case, there would
11 still have to be an analysis of whether it would be
12 appropriate for the public or other nonparties to have
13 access to that sealed affidavit. It would not be that it
14 was made public as a matter of course.

15
16 And just -- sorry, just one other note --

17 THE COURT: Sure.

18 MR. SOBELMAN: -- in response to counsel's
19 argument, which is, you know, there's a very strong
20 presumption here because search warrant affidavits are
21 something the Court relies upon and the press is really
22 interested here. We don't see any case where the media
23 attention is taken into account and given a stronger
24 presumption. It's a different analysis. But we'll note
25 that in *Amodeo II* at page 1050, the Court wrote -- and I

quote -- "For such documents are usually filed with the Court and are generally available, the weight of the presumption is stronger than where filing with the Court is unusual or is generally under seal." Here we have a circumstance where search warrant affidavits almost exclusively are filed under seal. So it cannot be that the presumption is the strongest it could possibly be, as counsel for the Reporters Committee suggests. In fact, we think it is quite minimal given that these types of documents are routinely, generally and almost exclusively filed under seal for the same reason that it should remain under seal here, which is that the interest of protecting a law enforcement investigation in an ongoing uncharged circumstance is substantial.

THE COURT: Okay. Does the government have any objection to the Reporters Committee's motion, the government's opposition and the reply being publicly available and then the Court's decision on the motion?

MR. SOBELMAN: No, your Honor. And in fact, I believe all three of those documents have been publicly filed on the 21-mc-813 docket.

THE COURT: Okay. I wasn't sure --

MR. SOBELMAN: And assuming the Court's decision does not make reference to specific details of the

1 PROCEEDINGS 17

2 affidavit at issue, we have no objection to the Court's
3 opinion being made publicly available.

4 THE COURT: Okay. All right. Thank you,
5 Mr. Sobelman.

6 Ms. Townsend, any points that you'd like to make
7 before we close?

8 MS. TOWNSEND: Yes, briefly, your Honor, I'll just
9 respond to a couple of points. We don't take the position
10 that it's simply the sort of unilateral disclosure that has
11 been made by Mr. O'Keefe and Project Veritas that sort of
12 put this search warrant perhaps -- or search warrant
13 materials perhaps on a different footing than other -- than
14 perhaps other search warrants. I think there is, as I said
15 earlier, an unusual amount of public information about this
16 investigation that has been put into the public domain,
17 both by Project Veritas and Mr. O'Keefe but also by the
18 government itself, who again has pointed precisely directly
19 to these materials in a public way, in public filings in
20 connection with the motion to appoint a special master that
21 was brought by Project Veritas to refute the arguments
22 being made by Project Veritas that there was anything
23 unlawful about the search that was conducted here. So it
24 isn't simply sort of unilateral representations that have
25 been made by Project Veritas and by Mr. O'Keefe.

And I would note, just to respond, your Honor, on some of the legal points that counsel made, the notion that the status of an ongoing investigation, somehow that's what the common law presumption of access hinges on is simply refuted by the Second Circuit case law that we've cited and a number of district courts within the Second Circuit that have squarely held that the presumption of access applies to search warrant applications and affidavits even though they are typically filed under seal prior to execution. That would be the Southern District of New York in *Cohen*, the *All Funds on Deposit* case which we cite throughout our briefing, *In Re Sealed Search Warrants Issued June 4 and June 5, 2008*, another case cited in our briefing. And I'd note that the Second Circuit in *In Re Newsday, Inc.* at pin cite 895 F. 2nd 79, directly refuted the argument that the fact that search warrants are commonly filed under seal until a warrant is executed somehow changes their status as public documents. It concluded precisely the opposite.

So I think the points that counsel is making are really points again about timing and perhaps redaction. The common law presumption of access applies to all of these materials. The question is, is it overcome at a given point in time and to what extent is it overcome. And it may be the typical case that the public knows nothing

about an ongoing investigation, that the government has put no information about an ongoing investigation into the public domain until well after a search warrant is executed; and in that case, it may be far more difficult to argue that information, redacted versions of search warrants, for example, should be made public prior to any indictments being issued. But here, even if no indictments ever issue, these are materials -- the showing that the government made to obtain this search warrant is still going to be of interest to the press and the public, it's still going to speak to actions that were taken by the government and to the search warrant that was ultimately issued by the Court. And so I think that those questions, those issues, go really to the heart of what the common law presumption of access is meant to do, which is to allow the public to observe the judicial process and particularly so in cases where the Court has acceded to or responded to a request made by a coordinate branch of government.

With that, your Honor, if you have no other questions, we'll rest on our briefing.

THE COURT: Okay. Great. Thank you very much. This has been very helpful. If I can ask the parties to coordinate to order a transcript of today's conference, that would be helpful to me, as well, and in the minute

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

20

entry for today's conference, we'll include how you do that. So if you could do that on as quickly a turnaround as is affordable, we would be grateful.

Thank you, both --

MR. SOBELMAN: Your Honor, was the conference -- sorry, your Honor -- was the conference recorded, or was it taken down by a reporter? That will just aid us in ordering it.

THE COURT: Yes, you're right. It was just recorded. We don't have a court reporter on the line for this.

MR. SOBELMAN: Thank you, your Honor. The government will do that.

THE COURT: Okay. Thank you so much. We're adjourned for today. Have a good afternoon.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of In re: Search Warrant dated November 5, 2021, Docket #21-mc-00813-AT, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Carole Ludwig

Date: November 30, 2021